

personal pleasures. If the weight tends toward the personal, the agent may disallow the entire deduction claimed, on the ground that the trip was primarily for personal pleasure. If there seems a reasonable amount of time spent on professional pursuits which meet the basic tests outlined above, the agent may allow a portion of the deductions claimed. There is no set rule on this point.

Where a wife travels with the physician, her expenses are not *deductible* unless real proof can be shown that her presence was necessary and served a *bona fide* business purpose. The fact that the wife made or typed notes or performed other incidental services is ordinarily inadequate proof for tax deductions.

The cost of such items as laundry, valet service, business entertainment and taxi fares to reach eating places other than the place of residence in a city on your itinerary may not be deducted.

Typical tours promoted among physicians include the "30-day trip to Europe with medical meetings scheduled in London, Paris, Rome and Bonn." Even

though medical meetings may take place in such cities on an itinerary, the primary purpose of the trip may be ruled a vacation and all expenses disallowed. Another form of such trips has been the "floating seminar" where passenger ships are used as mobile classrooms while traveling to and from distant points. Such trips are usual in the winter months, when overseas travel is at a low ebb and ships are available.

No concise statement on this subject can cover the many angles which may be presented. It is our hope here to set out only the basic tests which Internal Revenue Service may use in evaluating travel expenses which are claimed as tax deductions. Where a physician is contemplating such travel, he will do well to apply these tests fairly in advance to determine whether or not his expenses will really be allowed as deductions. He will also do well to document his deduction claims with dated receipts showing the nature and necessity of the expense—and, finally, to expect that the Internal Revenue Service will go over his deduction claims extremely carefully.

Blood Alcohol Test

Legal Effect of Participation

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THE SCOPE of this opinion is limited to the possible liability of a physician performing a blood alcohol test upon a person, assuming that the physician is not charged with negligence.

Assault and battery and false imprisonment would be the theory of legal liability upon which a physician or surgeon would be held to respond in damages for performing a blood alcohol test.

FALSE IMPRISONMENT

False imprisonment is the unlawful violation of the personal liberty of another in which an essential element is the restraint of the person.

"All that is necessary is that the individual be restrained of his liberty without any sufficient complaint or authority therefor, which may be accomplished by words or acts which the individual is afraid to disregard. Mere temporary detention is sufficient, and the use of actual physical force is not necessary." 22 Cal. Jur. 2d 38.

ASSAULT AND BATTERY

An assault is defined in law as any unlawful offer or attempt to injure another with apparent present ability to effectuate the attempt under circumstances

creating a fear of imminent peril. A battery is defined in law as the willful touching of the person of another and has been said to be the consummation of the assault, 6 C. J. S. 796. However, consent to or participation in the acts causing the injury by the injured party are a defense to an action for assault and battery.

It has been said: "A medical or dental surgeon who performs an operation without the consent of his patient is guilty of a battery." 4 UCLA L R 627.

Clearly, then, absent a legal consent, the withdrawal of blood for a blood alcohol test would constitute an assault and battery.

EXPRESS CONSENT

When a patient knowingly consents to a procedure no liability will attach absent negligence in the performance of a procedure. The law is stated in 86 C J S 930 as follows:

"Where a person has voluntarily manifested a definite assent to conduct which would be violative of his rights in the absence of consent, such conduct, in view of the assent, infringes no right and constitutes no tort. In order to sustain this defense, however, there must be a true assent, and a claimed assent which is not voluntary, or which is given by one incapable of assenting, is insufficient."

IMPLIED CONSENT

In certain situations where an emergency arises or where certain unanticipated conditions arise calling for immediate action and making it impractic-

cable to first obtain an express consent, the law will imply a consent.

In *Preston v. Hubbell* (1948), 87 CA 2d 53, the defendant was engaged to remove an impacted wisdom tooth under anesthesia. During the operation a fracture of the jaw occurred. While plaintiff was still anesthetized, defendant repaired the fracture. One of the issues raised was that the fracture was repaired without the plaintiff's express consent. The court held:

"When defendant was employed to extract the tooth, there was no discussion of other services that might be required and, since plaintiff was unconscious while the jaw was being repaired, she did not give express consent to that operation. The question is whether plaintiff's employment of defendant to remove the tooth was implied consent to the repair of her jaw that was broken during the operation, or in other words, whether plaintiff did not impliedly consent to the performance of such emergency work as became necessary in order to completely repair a condition that developed during the operation. We think the only rational answer to this question is that plaintiff must be deemed to have consented to the repair of the fracture. Defendant either had to reduce the fracture while plaintiff was unconscious or wait until she became conscious and then request her consent to the repair of the damage. It was necessary that the broken jaw be repaired promptly. Making the repair was as much in the line of defendant's professional work as was the extraction of the tooth. No reason is suggested why defendant would not have been requested to make the repair if plaintiff had been in condition to be consulted."

The court then stated that it is the general rule in cases of emergency, or unanticipated conditions where some immediate action is found necessary for the preservation of the life or health of a patient and it is impracticable to first obtain consent to the operation or treatment which the surgeon deems to be immediately necessary, that the surgeon is justified in extending the operation to remove and overcome such conditions without the express consent of the patient.

In *Wheeler v. Barker*, 92 CA 2d 776 (1949), the court held that:

"When a surgeon is confronted with an emergency or an unanticipated condition and immediate action is necessary for the preservation of the life or health of the patient and it is impracticable to obtain consent to an operation which he deems to be immediately necessary, it is his duty to do what the occasion demands within the usual customary practice among physicians and surgeons in the same or similar localities and he is justified in extending the operation and in removing and overcoming the condition without the express consent of the patient."

ABSENCE OF CONSENT

When a physician penetrates tissue or otherwise physically makes contact without the consent of the patient, this physical contact constitutes an assault and battery.

In *Ehlan v. Burrows* (1942) 51 CA 2d 141, the defendant removed three sound teeth without the consent of plaintiff or her husband and without any

necessity therefor in order to save her life or to meet an extreme emergency. The court stated:

"The removal of the three sound teeth without consent, has been held to constitute an assault."

In *Valdez v. Percy*, (1939) 35 CA 2d 485, an enlarged gland the size of a small egg in the right axilla was found and it was suggested it should be examined for tumor. The pathologist report indicated cancer and the physicians and surgeons proceeded with a radical mastectomy. In this case, the court stated:

"The evidence as to whether the plaintiff authorized the defendant doctors Percy and Hankins to remove her breast was, to say the least, in conflict, and should have been submitted to the jury. Whether a condition arose and was discovered during an authorized operation for the removal of plaintiff's enlarged axilla gland under her right arm, and which condition required another operation to remove her right breast, was also one of fact in connection with which the testimony was conflicting, and should have been determined by the triers of fact. *It is firmly established as the law that where a person has been subjected to an operation without his consent, such an operation constitutes technical assault and battery.*" (Emphasis ours.)

The statement in 4 UCLA L R at page 627 and 635 is pertinent:

"A medical or dental surgeon who performs an operation without the consent of his patient is guilty of a battery. . . . The majority and California rule is that in the absence of emergency, a doctor cannot extend an operation without the consent of the patient. The courts have refused to accept the defense of consent implied in law. . . ."

KNOWING CONSENT

What constitutes a "knowing consent" to avoid liability is an important question. In *McCue v. Clein*, 60 Texas 168, 169, 48 AMR 260, the court stated:

"Even in cases where no breach of the peace is involved and the act to which consent is given is a matter of indifference to the public order, the maxim of *volenti non fit injuria* presupposes that the party is capable of giving assent to his own injury. If he is divested of the power of refusal by reason of total or partial want of mental faculties, the damage cannot be excused on the ground of consent given. A consent given by a person in such condition is equivalent to no consent at all,—more especially when his state of mind is well known to the party doing him the injury."

It might be noted that in this same case the court held that *intoxication incapacitating a person from assenting defeats a defense based upon assent.*

The case of *People v. Rochin* (1950), 101 CA 2d 140, is a case very similar to that which would be presented by an action for assault and battery resulting from the taking of blood for blood alcohol tests. In this case the officers of the law without a search warrant broke into the bedroom of the defendant and observed the defendant swallowing two cellophane covered capsules. The defendant was placed in handcuffs and taken to an emergency hospital where a doctor's assistant strapped the handcuffed defendant to the operating table. A doctor

then placed an empty pail by the defendant, placed a tube down the defendant's throat and released a white chemical solution into the tube and into the defendant's stomach. The defendant vomited into the pail and the two capsules in cellophane floated in the pail. These capsules were then taken from the pail and delivered to the chemist in the sheriff's office. The District Court of Appeal held that the evidence thus illegally obtained was admissible and sufficient to sustain a conviction. However, the United States Supreme Court has reversed this decision. The language of interest to us in this matter was obiter dictum of the California District Court of Appeal at page 143 of the opinion cited which reads as follows:

"This court does not approve the conduct of deputy sheriff Jack Jones and deputies Smith and Shelton who were with him at defendant's home. Under the record here, they were guilty of unlawfully breaking into and entering defendant's room and were guilty of unlawfully assaulting and battering defendant while in the room. Under the record here, deputy Jack Jones and the alleged doctor of medicine, Mier, were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the alleged hospital. A remedy of defendant for such high-handed reprehensible conduct is an action for damages. It would appear that the sheriff should review the qualifications of said deputies to be entrusted with the authority of public office. Also, it would appear that the qualifications of said Mier as an ethical doctor of medicine should be reviewed."

This language of the District Court of Appeal of the State of California clearly indicates what the attitude of the court would be should the matter have

been brought before them on an action for assault and battery.

NO DUTY TO PERFORM

No person or officer has the legal right to force a physician to perform the act of drawing blood as required in a blood alcohol test if he does not desire to do so. The case of *People v. Duroncelay* (1957) 48 C 2d 766, in no way can be used as authority for this proposition. Further, this case is no protection to a physician or surgeon who is being sued for damages on the theory of assault and battery or false imprisonment. This case simply states that the evidence so obtained can be used in court against the person being charged with the criminal act. No protection is extended to the doctor who in any way has become involved in the taking of the blood sample and who is being sued in a civil action.

SUMMARY

No legal liability will arise when an express consent knowingly given is obtained. In an emergency as discussed above, the court will imply a consent. Borderline cases of questionable liability would be those where a consent has been obtained but factually the issue of *knowing consent* is raised. At the other end of the continuum we have the situation of clear liability for assault and battery and possibly for false imprisonment when no consent from the patient is obtained.

